Toh Kim Lian & Anor v Asia Insurance Co Ltd

HIGH COURT (KUCHING) — SUIT NO KG54/92/III
ELIZABETH CHAPMAN JC
30 MAY 1995

Insurance Law *— Duty of disclosure — Proposal form — Assured took up accident insurance — Assured declared in form that particulars given were true — Assured agreed that proposal formed basis of contract — Insurance policy lapsed — Assured took up second policy — Assured did not filled in new proposal form — Assured died in motor accident — Insurance company alleged policy void ab initio — Non-disclosure of material facts in proposal form — Whether second policy was renewal policy or new contract — Whether basis clause in proposal form applied to second policy*

Insurance Law *— Accident insurance — Duty to disclose material facts concerning health of assured — Whether necessary*

By a policy of insurance dated 6 September 1989 ('the first policy'), Asia Insurance Co Ltd ('the defendant') insured one Lau Lip Guan ('the deceased') in the sum of RM200,000 against death by accident. The deceased had earlier declared in the proposal form for the first policy ('the proposal form') that the particulars in the form were true and agreed that the proposal would be the basis of the contract between the parties ('the basis clause'). The first policy lapsed on 19 August 1989, and the deceased took up a second policy, which was valid from 24 August 1989 to 23 August 1990. However, no proposal form was signed. On 24 April 1990, the deceased died as a result of a motor accident. The administratrix of the estate of the deceased ('the first plaintiff') and the beneficiary named in the policy of insurance ('the second plaintiff') furnished proof of the death of the deceased. The defendant, however, repudiated liability on the ground that the policy was void ab initio because of non-disclosure by the deceased of material facts in the proposal form in respect of the deceased's medical health, ie that he was suffering from diabetes, hypertension and ischaemic heart disease. The defence contended that the second policy was a renewal policy and hence, it was entitled to avoid the second policy on the ground of non-disclosure of material facts in the proposal form which formed the basis of the contract contained in the second policy. The issues before the court were: (i) whether the basis clause applied to the second policy; and (ii) whether there was non-disclosure and/or breach of contract by the insured.

Held, allowing the claim:

(1) It is a general principle of insurance law that an insured is under a duty to disclose material facts, and the absence of a proposal form does not modify the assured's duty. However, there is no duty to disclose facts which the assured did not know, and which he could not be reasonably expected to know at any material time (see p 153E–H).

(2) The second policy was not a renewal policy but a new contract, and therefore, the proposal form could not form the basis of the contract in the second policy. The first policy was silent on the question of renewal, and the second policy stated that it was to replace the first policy. The scope of both policies was also different. It follows that the defence of the alleged breach of duty to disclose material facts in respect of the second policy could not be sustained (see p 154F–I).

(3) The general principle in insurance law is that a fair and reasonable construction must be placed in the question on the proposal form (see p 156E); *Pacific and Orient Insurance Co Sdn Bhd v Kathirevelu [1992] 1 MLJ 249* followed.

(4) If there was a duty to disclose material facts concerning the health of the deceased for the personal accident policy, this duty should be confined to disclosure of serious illness or disease which would prevent the insured from leading a normal working life. Diabetes and hypertension were not such serious illnesses. Ischaemic heart disease might be a serious illness, but there was no evidence to show that the deceased actually suffered from or was aware of having the disease when he took out the second policy. Furthermore, there was evidence to show that for personal accident policies, no medical examination was required (see p156C–F).

[Bahasa Malaysia summary

Melalui polisi insurans bertarikh 6 September 1989 ('polisi pertama'), Asia Insurance Co Ltd ('defendan') menginsuranskan Lau Lip Guan ('si mati') dalam jumlah RM200,000 terhadap kematian akibat kemalangan. Si mati sebelum ini telah mengisytiharkan dalam borang cadangan untuk polisi pertama ('borang cadangan tersebut') bahawa maklumat peribadinya dalam borang tersebut adalah benar dan bersetuju bahawa cadangan itu dijadikan dasar kontrak di antara kedua-dua pihak ('klausa asas'). Polisi pertama telah luput pada 10 Ogos 1989, dan si mati telah mengambil polisi kedua, yang sah dari 24 Ogos 1989 sehingga 23 Ogos 1990. Bagaimanapun, tiada borang cadangan ditandatangani. Pada 24 April 1990, si mati meninggal dunia akibat satu kemalangan motor. Pentadbir harta pusaka si mati ('plaintif pertama') dan benefisiari yang dinamakan dalam polisi insurans ('plaintif kedua') memgemukakan bukti tentang kematian si mati. Bagaimanapun, defendan menolak liabiliti atas alasan polisi itu batal ab initio disebabkan ketakdedahan fakta-fakta material oleh si mati dalam borang cadangan tersebut berkenaan dengan kesihatan si mati, iaitu si mati menghidapi penyakit diabetes, hipertensi dan penyakit jantung ischaemic. Pihak pembela menghujahkan bahawa polisi kedua merupakan pembaharuan polisi dan justeru itu, ia berhak mengelak polisi kedua atas alasan ketakdedahan fakta-fakta material dalam borang cadangan tersebut, yang membentuk dasar kontrak yang didapati dalam polisi kedua. Isu-isu yang harus dipertimbangkan oleh mahkamah ialah: (i) sama ada klausa asas terpakai dalam polisi

kedua; dan (ii) sama ada terdapat ketakdedahan dan/atau kemungkiran kontrak oleh pengambil insurans tersebut.

Diputuskan, membenarkan tuntutan tersebut:

(1) Adalah merupakan prinsip am undang-undang insurans bahawa pengambil insurans berkewajipan mendedahkan fakta material, dan ketiadaan borang cadangan tidak mengubah kewajipan pengambil insurans itu. Walau bagaimanapun, tidak terdapat kewajipan untuk mendedahkan fakta yang pengambil insurans itu tidak tahu, dan yang adalah tidak munasabah untuk mengharapkan dia tahu pada sebarang masa material (lihat ms 153E–H).

(2) Polisi kedua bukannya satu polisi pembaharuan tetapi satu kontrak baru, dan borang cadangan tidak boleh diterima sebagai asas kontrak polisi kedua. Polisi pertama tidak menyatakan apa-apa tentang soalan pembaruan, dan polisi kedua menyatakan bahawa ia menggantikan polisi pertama. Skop kedua-dua insurans juga adalah berlainan. Oleh itu, pembelaan bahawa terdapat kemungkiran kewajipan untuk mendedahkan fakta material berkenaan dengan polisi kedua tidak boleh dikekalkan (lihat ms 154F–I).

(3) Prinsip am undang-undang insurans ialah bahawa suatu pentafsiran yang adil dan munasabah harus digunakan berkenaan dengan borang cadangan (lihat ms 156E); *Pacific and Orient Insurance Co Sdn Bhd v Kathirevelu [1992] 1 MLJ 249* diikut.

(4) Jika terdapatnya kewajipan untuk mendedahkan fakta-fakta material berhubungan dengan kesihatan si mati untuk polisi kemalangan diri, kewajipan ini patut hanya dihadkan kepada pendedahan penyakit yang serius yang dapat menghalang pengambil insuran daripada menjalankan kerja biasa. Diabetes dan hipertensi bukan merupakan penyakit serius yang dimaksudkan itu. Penyakit jantung ischaemic mungkin merupakan penyakit serius, tetapi tidak ada keterangan untuk menunjukkan bahawa si mati sesungguhnya telah menyedari bahawa dia menjangkiti penyakit tersebut apabila dia mengambil polisi kedua itu. Lagipun, terdapat keterangan bahawa untuk polisi kemalangan diri, tidak ada pemeriksaan perubatan yang diperlukan (lihat ms156C–F).]

Notes

For cases on insurance law, see 8 *Mallal's Digest* (4th Ed) paras 1–161; [1989] Mallal's Digest 917–922; [1990] Mallal's Digest 693–701; [1991] Mallal' Digest 1210–1224; [1992] Malla] Digest 1077–1096; [1993] Mallal's Digest 865–883; [1994] Mallal's Digest 1459–1476.

Case referred to

'Melanie' United Oriental Assurance Sdn Bhd Kuantan, The v MM Mazzarol [1984] 1 MLJ 260

Pacific and Orient Insurance Co Sdn Bhd v Kathirevelu [1992] 1 MLJ 249

Legislation referred to

Insurance Act 1963 s 44 (A)

Tang King Hong (*Tang & Partners*) for the plaintiffs.
Cheng Hui Hong (*Cheng & Cheng Advocates*) for the defendants.

Cur Adv Vult

Elizabeth Chapman JC: The first plaintiff in this case is the administratrix of the estate of Lau Lip Guan (deceased). By a policy of insurance dated 6 September 1989 between the said Lau Lip Guan and the defendants, Asia Insurance Co Ltd, the defendants, in consideration of a premium of RM368, insured the deceased in the sum of RM200,000 against death by accident. The second plaintiff is the beneficiary named in the said policy of insurance.

On 24 April 1990, the deceased died at the Sarawak General Hospital as a result of a motor accident at the Kuching by-pass at Sungai Apong junction on 23 April 1990.

The plaintiffs furnished proof of the death of the deceased and requested the said sum of RM200,000, but the defendants repudiated liability through their solicitors vide their letter dated 16 January 1992.

The claim against the defendants now is by the first plaintiff as administratrix, and the second plaintiff as beneficiary.

The defendants contend that the said policy of insurance is void ab initio because of non-disclosure by the said deceased of material facts in the proposal form in respect of the deceased's medical health. The particulars of non-disclosure are as follows:

(a) failing to disclose the deceased's history of diabetes mellitus and/or hypertension; and

(b) failing to declare that the deceased was suffering from ischaemic heart disease.

The defendants further contend that the truth of the information regarding the deceased's health is warranted, and it forms the basis of the contract by virtue of the basis clause in the proposal form. The basis clause states as follows:

> I hereby declare that the particulars of the proposal form are true, and I agree that this proposal shall form the basis of the contract between myself and the Asia Life Insurance Co Ltd.

The bottom of the proposal form reads as follows:

> NB When filling in this form, please see that all questions are answered fully and actually.

Further, at the top of the proposal form, the following words appear:

> Pursuant to s 16 (4) of the Insurance Act 1963 you are to declare in this proposal form, fully and faithfully all the facts which you know or ought to know otherwise the policy issued hereunder may be void. (See D1–11 of defendant's bundle).

The agreed issues to be tried are:

(i). whether the basis clause applies to the second policy; and

(ii) whether there was non-disclosure and/or misrepresentation and/or breach of contract by the insured.

It is conceded by the defence that the deceased insured died on 24 April 1990, as a result of a road accident, and that the validity of the second policy is from 24 August 1989 till 23 August 1990.

The defence case is that the second policy is a renewal policy and hence, it is entitled to avoid the second policy on the ground of non-disclosure of material facts in the proposal form which formed the basis of the contract contained in the second policy. Shortly before the trial of this case began, a rejoinder was filed by the defendants which raised for the first time the duty to disclose material changes in circumstances upon renewal. The alleged breach of duty of non-disclosure of material facts before the formation of the contract in the second policy was not specifically pleaded.

It is a general principle of insurance law that an insured is under a duty to disclose material facts, and the absence of a proposal form does not modify the assured's duty.

In Ivamy's *General Principles of Insurance Law* (5th Ed) it is stated at p 122:

> It is the duty of the proposed assured to disclose to the insurers all material facts within his actual knowledge. The special facts distinguishing the proposed insurance are, as a general rule, unknown to the insurers who are not in a position to ascertain them. They lie, for the most part, solely within the knowledge of the proposed assured.

However, such a breach of duty to disclose is distinct and separate from the duty to disclose material facts. There is no duty to disclose facts which the assured did not know, and which he could not be reasonably expected to know at any material time.

Thus, Fletcher Moulton LJ stated the principle concerning life insurance in the following words:

> But the question always is: was the knowledge that you possess such that you ought to have disclosed it? Let me take an example. I will suppose that a man, as in the case with most of us, occasionally had a headache. It may be that a particular one of these headaches would have told a brain specialist of hidden mischief. But to the man it was an ordinary headache indistinguishable from the rest. Now, no reasonable man would deem it material to tell an insurance company of all the casual headaches he had in

> his life, or if he knew no more as to this particular headache than that it was an ordinary casual headache, there would be no breach of his duty towards the insurance company in not disclosing it. He possessed no knowledge that it was incumbent on him to disclose, because he knew of nothing which a reasonable man would deem material, or of a character to influence the insurers in their action. It was what he did not know which would have been of that character, but he cannot be held liable for non-disclosure in respect of facts which he did not know.

The questions in particular to which the defendants state that there are non-disclosures and/or misrepresentations are those relating to the deceased's health, in particular questions 11 and 12 which are as follows:

> 11. Are you now in sound health and do you ordinarily enjoy sound health?
>
> Yes.
>
> 12. Is your hearing or sight in any way impaired or have you any physical defect of infirmity?
>
> No.

Whether the renewal of a policy is a continuation of the original contract or the making of a new contract is a question of importance in view of its effect on the duty of disclosure and the operation of conditions subsequent. See Ivamy, *General Principles of Insurance Law* (5th Ed) at p 247.

It is the plaintiffs' contention that the second policy is not a renewal policy, hence the defendants cannot rely on the proposal form to substantiate its allegation that there was non-disclosure of the deceased's medical condition.

The proposal form was signed by the deceased on 19 August 1988 when he took the first policy. The second policy was valid from 24 August 1989 to 23 August 1990, and no proposal form was signed. The first policy had lapsed on 19 August 1989, and there was an interval of four days before the second policy was taken. Furthermore, there was no renewal certificate pursuant to condition 12 of the first policy.

The second policy states that it is in lieu of and cancels cover note No 18828, and it replaces policy No 93-450-88, that is, the first policy. Condition 2 of both policies are different in their scope and coverage. DW1, the assistant manager of the defendant company, in his evidence agreed that the scope of both policies is different. Furthermore, the first policy is silent on the question of renewal, and where the policy is silent on the question of renewal, any renewal is probably a new contract (see Ivamy at p 249).

I find for the reasons given above that the second policy is not a renewal policy but a new contract, and the proposal form cannot, in my considered opinion, form the basis of the contract of the second policy.

The next issue before the court is whether there was non-disclosure, and/or misrepresentation and/or breach of contract by the insured.

The alleged breach of duty to disclose material facts before the formation of the contract in the second policy has not been specifically

pleaded, but as I have held earlier, the second policy is a new policy and the defence of the alleged breach of duty to disclose material facts in respect of the second policy cannot, therefore, be sustained.

The defence contention is that the deceased did not disclose:

(a) his history of diabetes;

(b) his hypertension; and

(c) his ischaemic heart disease.

The onus of proof of non-disclosure is on the defendants.

PW1, the widow of the deceased, testified that she knew the deceased was a diabetic and that he was on medication. As far as she knew, the deceased was not suffering from hypertension or ischaemic heart disease.

PW2, the insurance agent, testified she knew the deceased had diabetes, and that she was the one who filled in the proposal form for the deceased. In the rejoinder, the defence alleges collusion between PW2 and the deceased. However, even at the time of the trial, PW2 was still the insurance agent of the defendants; her agency was never terminated.

DW3, Dr Lawrence Lee and DW6, Dr Majumder, both testified that the deceased himself volunteered the information that he had mild diabetes. It is obvious from the evidence adduced that the deceased did not try to hide anything. In the circumstances, s 44 (A) of the Insurance Act 1963, applies, and the defendants are deemed to have knowledge of the diabetic condition of the deceased: see The 'Melanie' United Oriental Assurance Sdn Bhd Kuantan v MM Mazzarol [1984] 1 MLJ 260.

The next issue is whether the insured had failed in his duty to disclose that he was suffering from hypertension before he took the second policy.

PW1 testified that the deceased did not suffer from any hypertension, and that the only time her husband was admitted to Normah Hospital was in November 1989. DW4, the specialist in Normah Hospital, testified that the deceased had suffered from a transient ischaemic attack, but had completely recovered upon discharge. He was given mild hypertension drugs and responded to treatment. DW4 also told the court that abnormalities of blood pressure were normally found in transient ischaemic attacks. The deceased had also gone to see DW3 who found his blood pressure to be normal. This was also confirmed by DW6 who said the deceased's blood pressure was normal when the deceased visited him.

From the evidence of the three doctors, it cannot be presumed that the deceased knew he was suffering from hypertension when he took out the second policy. Indeed, I can find nothing from the evidence adduced that the deceased was suffering from permanent hypertension at the time he took out the second policy. Hence, he cannot be said to have failed to disclose such material facts when he did not even know of it and when the evidence shows that the doctors who saw him found his blood pressure to be normal.

The evidence of DW2, Dr Mapphy Duncan, a pathologist, shows that the ischaemic heart of the deceased was only discovered during the

post mortem. DW2 further testified that a person could suffer from such a condition without knowing it, and there could be no symptoms at all until the patient collapses. There was no evidence from the other four medical experts who testified at the trial to show that the deceased knew he had ischaemic heart disease nor was the deceased ever treated for it during his life time. In the premises, the deceased cannot be said to have failed to disclose this condition for the duty to disclose a material fact only arises if the said fact is within the knowledge or presumed knowledge of the insured.

It is not disputed that the deceased died as a result of a road traffic accident. He did not die from diabetes, hypertension or ischaemic heart disease, and there is evidence from the pathologist, DW2 that the deceased would have died even if he did not suffer from ischaemic heart disease.

The purpose of an accident policy is to insure the insured against bodily injury caused in an accident. The testimonies of PW2, the insurance agent, and DW1, the assistant manager of the defendant firm, both testified that for personal accident policies, no medical examination was required. If there is a duty to disclose material facts concerning the health of the deceased for the personal accident policy, then this duty, in my opinion, should be confined to disclosure of serious illness or disease which would prevent the insured from leading a normal working life. The general principle in insurance law is that a fair and reasonable construction must be placed in the question on the proposal form: see *Pacific and Orient Insurance Co Sdn Bhd v Kathirevelu* [1992] 1 MLJ 249.

Diabetes and hypertension would not qualify in this category of serious illness or disease such as to prevent the insured from living a normal working life. Ischaemic heart disease may be such a serious illness, but there is no evidence before this court to show that the deceased actually suffered from the disease nor was there anything to show that he was aware he had such a condition when he took out the second policy. Furthermore, there was evidence to show that for personal accident policies, no medical examination was required.

For the reasons given, I find that the defendants have not discharged their burden on a balance of probabilities that the deceased was guilty of non-disclosure of material facts which would entitle them to avoid the policy. There is nothing in the evidence to show that the deceased knew or had reason to believe he was suffering from hypertension or ischaemic heart disease when he signed the proposal form for the first policy and when he took out the second policy. As for the deceased's diabetic condition, it is imputed on the defendants by law. Judgment is accordingly entered in favour of the plaintiffs in terms as prayed for in the statement of claim with costs to be taxed, unless agreed.

Order accordingly.

Reported by Kee Seok Meng